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(continued on next page)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

THE STATE OF CALIFORNIA; THE STATE OF CONNECTICUT; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF HAWAII; THE STATE OF ILLINOIS; THE STATE OF MARYLAND; THE STATE OF MINNESOTA, by and through its Department of Human Services; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF RHODE ISLAND; THE STATE OF VERMONT; THE COMMONWEALTH OF VIRGINIA; THE STATE OF WASHINGTON,

Case No. 4:17-cv-05783-HSG

LITTLE SISTERS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs,

THE STATE OF OREGON,

Intervenor-Plaintiff,

V.

ALEX M. AZAR, II, in his Official Capacity as Secretary of the U.S. Department of Health & Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; R. ALEXANDER ACOSTA, in his Official Capacity as Secretary of the U.S. Department of Labor; U.S. DEPARTMENT OF LABOR; STEVEN MNUCHIN, in his Official Capacity as Secretary of the U.S. Department of the Treasury; U.S. DEPARTMENT OF THE TREASURY;

Defendants,

and,

1 THE LITTLE SISTERS OF THE POOR, JEANNE
2 JUGAN RESIDENCE; MARCH FOR LIFE
3 EDUCATION AND DEFENSE FUND,

4
5 *Defendants-*
6 *Intervenors.*

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1 The Little Sisters of the Poor, Jeanne Jugan Residence (Little Sisters) submit this notice of
 2 supplemental authority as relevant to the pending motions to dismiss or, in the alternative, to grant
 3 summary judgment (ECF 311, 366, 368, 370) which were being held in abeyance prior to the parties'
 4 status report on April 30 (ECF 454).

5 In its April 9 decision in *Tandon v. Newsom*, the U.S. Supreme Court enjoined, under the Free
 6 Exercise Clause, California's COVID-19 restrictions on multi-household gatherings in private homes,
 7 as applied to at-home religious exercise. 141 S. Ct. 1294 (2021). *Tandon* summarizes multiple "clear"
 8 principles from recent Free Exercise cases. As relevant here, those principles demonstrate why the
 9 agencies were obligated to expand the religious exemption, and why this Court cannot constitutionally
 10 grant the relief the States seek, namely allowing the "prior rules [to] spring back into effect." Summ.
 11 J. H'rg Tr. 9:7-8 (States' counsel). *Tandon* thus both resolves the States' claims on the merits and
 12 confirms their lack of standing, because the redress they seek cannot be provided.

13 First, *Tandon* establishes that "government regulations are not neutral and generally applicable,
 14 and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any*
 15 comparable secular activity more favorably than religious exercise," even where "some comparable
 16 secular businesses or other activities [are treated] as poorly as or even less favorably than the religious
 17 exercise." 141 S. Ct. at 1296 (emphasis in original). And whether an entity is "comparable" is "judged
 18 against the asserted government interest that justifie[d] the regulation at issue." A distinction based on
 19 *other* government interests is not relevant. *Id.*

20 Here, the Affordable Care Act's statutory scheme grants many secular businesses an exemption
 21 denied the Little Sisters in the underlying Mandate, and the implementing regulations further grant
 22 some religious entities an exemption denied the Little Sisters. ECF 371 at 4, 29 (discussing exemptions
 23 for, e.g., small businesses, grandfathered plans, and churches). And *Tandon* makes clear that whether
 24 *some* comparator entities labor under the same burden as the Little Sisters is irrelevant; strict scrutiny
 25 applies under the Free Exercise Clause when "*any* comparable secular" entity gets better treatment.
 26 141 S. Ct. at 1296. Whatever reasons might support the government's other exemptions (like employer
 27 convenience) do not change the tier of scrutiny, since only "the asserted government interest"—
 28 making contraception more available—matters to the comparator analysis. *Id.*

1 Second, *Tandon* makes clear that for the government to satisfy its “burden to establish that the
 2 challenged law satisfies strict scrutiny” when other conduct is exempted, it must “show that the
 3 religious exercise at issue” threatens the government interest to a *greater* degree than the other
 4 exempted conduct—not just that it threatens the interest *at all*. *Id.* If it does not, then the regulations
 5 “that suffice for other activities suffice for religious exercise too.” 141 S. Ct. at 1297 (government
 6 failed to show religious exercise was “more dangerous” than those activities allowed to proceed with
 7 fewer “precautions”).

8 Here, the States’ arguments (ECF 433 at 10) that an exemption would impose increased “burdens
 9 of seeking out and obtaining contraceptive care” are not only mistaken, *see* ECF 437 at 17-18, but now
 10 beside the point. When the federal government decided to exempt many other secular and religious
 11 employers notwithstanding any detriment to the Mandate’s goals, strict scrutiny foreclosed placing
 12 any greater burden on the Little Sisters. The Federal Defendants previously explained—in defending
 13 the Mandate at the Supreme Court—the “precautions,” 141 S. Ct. at 1297, that the government
 14 believed mitigated the exemptions: employees’ opportunity to “obtain coverage through a family
 15 member’s employer, through an individual insurance policy purchased on an Exchange or directly
 16 from an insurer, or through Medicaid or another government program” and thus obtain “contraceptive
 17 coverage.” Respondents’ Br. at 65, *Zubik v. Burwell*, No. 14-1418 (Feb. 10, 2016). And once Congress
 18 and the agencies determined that these alternatives sufficiently mitigated the detriment from the other
 19 exemptions, the First Amendment required that the agencies subject religious entities to no greater
 20 restrictions. *Tandon*, 141 S. Ct. at 1297.

21 Put simply, *Tandon* dictates that where a secular activity is treated “more favorably” than a
 22 religious activity that implicates the same “asserted government interest,” the religious activity must
 23 be given the same favorable treatment under the Free Exercise Clause. 141 S. Ct. at 1296. So the
 24 agencies had no option to deny religious objectors an exemption. Nor could this Court provide the
 25 States with the relief they seek—reimposition of the “prior rules,” Summ. J. H’rg Tr. 9:7-8—where
 26 that remedy would be constitutionally barred by the Free Exercise Clause.

27 *Tandon* thus confirms that the States cannot prevail in this case, and that their claims are not
 28 redressable. This Court should dismiss the States’ complaint or enter judgment against them.

1 Dated: May 07, 2021

Respectfully submitted,

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3 /s/ Mark L. Rienzi

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